Supreme Court, U.S.
FILED

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# In The Supreme Court of the United States

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**JEFFREY A. CRAWFORD,**

*Petitioner,*

**v.**

**K. J. BASSETT, WARDEN,**

*Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Fourth Circuit decided an important federal question in a manner that conflicts with relevant decisions of this Court when the Court of Appeals denied appellant's petition for a Certificate of Appealability. Rule 10(c).

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IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. CRAWFORD

Petitioner

versus

K. J. BASSETT, Warden

Respondent

# PETITION FOR WRIT OF CERTIORARI

## Corporate Disclosure Statement

There are no corporate entities who are parties in this case.

## Orders Entered in the Case

Unpublished order of dismissal in the United States Fourth Circuit Court of Appeals, *Jeffrey A. Crawford v. K. J. Bassett,* Case No. 04-7963 entered May 5, 2005.

United States District Court, Eastern District, No. 1:03cv1506 entered November 16, 2004.

## Jurisdiction

A final order of dismissal in the above-captioned case was entered in the United States Fourth Circuit Court of Appeals on May 5, 2005. Appellate jurisdiction in this Court is based upon 28 U.S.C. § 1254 which provides in pertinent part:

"Cases in the courts of appeals may be reviewed by the

Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

See *Hohn v. U.S.*, 524 U.S. 236, 118 S.Ct. 1969, 1978 (1998)(Supreme Court has jurisdiction under § 1254(1) to review denials of applications for certificates of appealability by a circuit judge or a panel of a court of appeals).

## Statutory Provisions Relevant to this Case

28 U.S.C. § 2253(c)

"(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken of appeals from-

"(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

* * * * * * * * * * * * *

"(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

## Statement of the Case

Petitioner is a Virginia prisoner currently housed in the Keen Mountain Correctional Center, Keen Mountain, Virginia. He was convicted in the Circuit Court of Gloucester County, Virginia of armed statutory burglary, robbery, abduction and rape. On June 30, 1998 petitioner was sentenced to serve two life sentences for armed statutory burglary and rape, forty years for abduction, and twenty years for robbery.

Petitioner thereafter filed a succession of appeals and a petition for habeas corpus in the Virginia state courts alleging, inter alia, ineffective assistance of counsel in his trial proceedings. Petitioner's appeals were dismissed and habeas relief was denied on the merits by the Virginia Supreme Court on August 14, 2003.

On November 24, 2003 petitioner filed a *pro se* petition for writ of habeas corpus in the United States District Court, Eastern District of Virginia, Alexandria Division. Jurisdiction lay in the district court pursuant to 28 U.S.C. § 2254.

The respondent objected that the federal habeas petition was not timely filed. Accordingly, the district court entertained briefs on the timeliness question and on April 26, 2004 entered an order granting petitioner the benefit of equitable tolling of the time limit of 28 U.S.C. § 2244(d) and allowed the habeas petition to proceed (Civil Action No. 03-1506-AM). Respondent thereafter filed a motion to dismiss arguing, inter alia, that petitioner's late filing was the result of a "quarterly" lockdown which petitioner should have anticipated and allowed for in his preparation for filing his petition for writ of habeas corpus. Petitioner filed responsive pleadings, but on November 16, 2004 the district court vacated the order of April 26, 2004 and ruled that petitioner's habeas petition was time barred, having been filed ten days after the § 2244(d) time limit had expired. The district court did not rule on the merits of the habeas petitions. The district court further declined to grant a certificate of appealability.

Petitioner thereafter filed an appeal in the United States Court of Appeals for the Fourth Circuit requesting that the appeals court reverse the district's court final decision regarding equitable tolling of the statute of limitations, that

the case be remanded to the district court for further proceed[illegible] on petitioner's habeas petition, and that the court of appe[illegible]ssue a certificate of appealability in the case. By per curiam opinion of May 5, 2005 the court of appeals denied petitioner's request for a certificate of appealability and dismissed his appeal.

Argument

The three-judge panel per curiam opinion of the court of appeals cited cases including *Slack v. McDaniel,* 529 U.S. 484, 120 S.Ct. 1595 (2000) regarding the standard that petitioner must meet in support of the issuance of a certificate of appealability by the appeals court (Appendix, pages A1 - A2):

> 28 U.S.C. § 2253(c)
> "(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from-
> "(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;
> * * * * * * * * * * * * *
> "(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

The court opined that "Crawford has not made the requisite showing." but offered no analysis to show that *Crawford* was not entitled to the rule of *Slack v. McDaniel* and gave no hint as to the particulars of the deficiencies that the court may have noted in petitioner's preliminary informal brief as filed in that court.

Petitioner was mindful of the requirements of 28 U.S.C. § 2253(c)(1) and (c)(2) which imposes a two-pronged standard that petitioner must meet in order to qualify for relief in the court of appeals: 1) that petitioner must show clear error in the decision of the district court below and 2) that the petitioner must make a substantial showing of the denial of a constitutional right.

1. Error in the District Court

Under the heading of Issues on Appeal in Petitioner's Preliminary Informal Brief in the court of appeals petitioner clearly argued and gave exhibits and evidence in support of the argument that petitioner was prevented from timely filing his federal habeas petition by 1) an *unanticipated* institutional lockdown at Keen Mountain, and 2) the fact that petitioner was illiterate to the extent that he was not able to read cases and other materials without assistance and could not complete his petition without the assistance of other inmates, which assistance was not available at all during the institutional lockdown (Appendix, pages A5-A8). Petitioner's exhibits as presented to the court of appeals included a memorandum from Warden Barrett which advised the inmate population of "Emergency Security Lockdown" commencing on November 10, 2003. This lockdown ended on November 23, 2004 and was therefore in effect on the last day of the filing period under § 2244(d), November 14, 2003. Petitioner was finally able to complete and file his habeas petition on November 24, 2003, the first day after the end of the lockdown. The petitioner's circumstances clearly fell within the rationale of *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Circ.2000) which provides that equitable tolling of a limitation period may be granted in the event that petitioner is prevented from filing due to extraordinary circumstances

beyond petitioner's control and external to his own conduct. Petitioner was indeed diligent in seeking emergency assistance (which assistance was not provided) during the lockdown and in filing his petition at the earliest possible moment following the end of the lockdown. In fact, petitioner was informed in writing by an inmate counselor during the lockdown that he would be able to complete the filing of his habeas petition *after* the lockdown had been lifted. The foregoing information was fully briefed and documented for the 4th Circuit Court of Appeals.

2. Denial of a Constitutional Right

Petitioner's state and federal habeas petitions included essentially the same 6th Amendment claims of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).[1] Petitioner's Claim A claimed ineffective assistance of counsel by reason of counsel's failure to investigate or offer an alibi defense at trial. This ineffective assistance claim had been rejected by the Virginia Supreme Court in state habeas proceedings because petitioner's trial counsel filed an affidavit incident to state habeas proceedings claiming that "...petitioner told counsel that petitioner was in the victim's bedroom and that the victim performed consensual, oral sex on him."[2]

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[1]The district court's memorandum opinion of November 16, 2004 recited petitioner's habeas Claims A. through H. but made no findings on the merits of those claims.

[2]The quoted language appears in the Virginia Supreme Court order of Aug. 14, 2003 dismissing petitioner's claims on the merits. *Crawford v. Dir. of Dept. Of Corr.*, R. No. 022647. Trial counsel offered, and the Va. Sup. Ct. accepted, the same rationale

Petitioner's trial counsel concluded that petitioner's reliance upon alibi witnesses was in bad faith and that it would be unnecessary to investigate petitioner's alibi witnesses. It was argued in petitioner's Preliminary Informal Brief in the 4th Circuit Court of Appeals that counsel's affidavit was inherently incredible given that the victim had testified in detail at preliminary hearing and at trial (both hearings with the benefit of a court reporter) regarding the violent rape and robbery that had allegedly occurred in her home but had said nothing about oral sex, consensual or otherwise. The victim did not see the face of her assailant and did not identify petitioner at trial (Appendix, page A9-A10 ). It is therefore incomprehensible that trial counsel did not challenge and discredit this notion of consensual oral sex or that counsel did not seek the benefit of a mental health evaluation of a client who would contrive such a preposterous scenario.

Trial counsel's decision to not investigate petitioner's alibi witnesses is now very much open to question given that one Yvonne Harnetha Cooke has been located and has provided an affidavit to petitioner's current counsel regarding her knowledge of petitioner's whereabouts at the time of the alleged offense on November 18, 1995.(Appendix, pages A14-A15)[3] Petitioner's 6th Amendment claim of ineffective assistance due to counsel's unreasonable failure to investigate alibi witnesses in this case therefore constitutes a 6th

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as a reason for counsel's failure to investigate one Thomas Brown, another prime suspect in the case.

[3]The time allowed for filing the instant petition enabled present counsel to locate an alibi witness, Yvonne Harnetha Cooke, whose name had been given to trial counsel and whom petitioner had fully expected to be called as a witness at trial.

Amendment violation at least as grievous as counsels' deficiencies in *Williams v. Taylor*, 529 U.S. 391, 120 S.Ct. 1495 (2000)(failure to investigate and present mitigation evidence at sentencing) and *Wiggins v. Smith*, 539 U.S._____, 123 S.Ct. 2527(2003)(failure to investigate and present mitigation evidence at sentencing).

3. The Rule of *Slack v. McDaniel*

The posture of petitioner's case in this Court is foursquare within the holding of *Slack:*

> "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," *Slack,* 120 S.Ct. 1604.

The particular standard in this Court for a substantial showing of the denial of a constitutional right is given in *Barefoot v. Estelle*, 463 U.S. 891, 103 S.Ct. 3383 (1983). The petitioner must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further. *Barefoot*, 103 S.Ct. 3395, n.4, citing *Gordon v. Willis*, 516 F.Supp. 911 (ND Ga. 1980).*Gordon* held that "Even a 'weak' argument...is properly certified under § 2253, whereas a 'frivolous argument'–one for which no rational argument can be made–is not subject to § 2253 certification." *Gordon* at